

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 74-1268

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UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

HAROLD BIGELOW and VIRGINIA BIGELOW and  
COOPERATIVE FIRE INSURANCE ASSOCIATION  
OF VERMONT,

Plaintiffs-Appellants,

v.

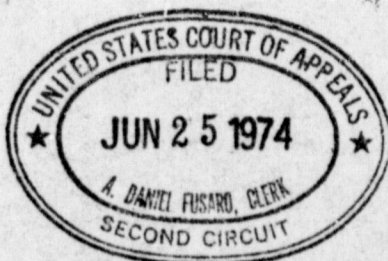
AGWAY, INC. and KEMIN INDUSTRIES, INC.

Defendants-Appellees.

Appeal from the United States District Court  
for the District of Vermont, Honorable  
James S. Holden, Chief Judge.

BRIEF FOR DEFENDANT-APPELLEE  
KEMIN INDUSTRIES, INC.

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I. STATEMENT OF ISSUES

- A. Whether proximate cause was shown by any or sufficient evidence.
- B. If proximate cause was shown, whether this Court should affirm the judgment below because assumption of the risk bars Plaintiffs' recovery.

II. STATEMENT OF THE CASE

Kemin Industries, Inc. adopts the Appellants' Statement of the Case. It should be noted, however, that not only was there no evidence presented that the product Hay Savor was dangerous or defective when used, but also at trial counsel for Plaintiffs stated that no such claim was being made (T342-343).

III. STATEMENT OF THE FACTS

A. THE PRODUCT HAY SAVOR

Hay Savor is a chemical product manufactured in Des Moines, Iowa by Kemin Industries, Inc. and distributed throughout the country by farm suppliers such as Agway, Inc. It is a mixture of organic acids, designed to inhibit the growth of mold in hay (T514). Hay Savor is applied to hay during the baling process; as loose hay is compacted, a special applicator attached to the baler sprays Hay Savor over it, at the rate of two pounds of chemical per ton of hay (T58-60).

Two effects of mold inhibition make Hay Savor attractive to farmers and are stressed in marketing: (1) hay treated with Hay Savor may be baled at a higher moisture level than untreated hay, thus decreasing the time hay must cure in the field (T432-33), and (2) with mold growth retarded, the hay retains more of its nutrients and is a better quality feed (T515, 432).

To prevent rot, mold and the possibility of spontaneous combustion (T64), ordinary untreated hay should not be baled until the moisture content has decreased -- through curing in the field -- to about 20 per cent (T494). Hay treated with Hay Savor, however, may be baled at moisture levels as high as 25 per cent. Users of the product are so informed, and warned in sales brochures (see Plaintiffs' Exhibit #4; T517-518) and by labels on the cannisters in which the product is sold (see Agway's Exhibit C; T376).

#### B. SPONTANEOUS COMBUSTION IN HAY

Spontaneous combustion in hay is a chain reaction process (T517), part bacteriological and part chemical in nature. Bacteria in the cut hay continue to grow and use oxygen to burn material in them, producing heat (T519). If the mass of hay is sufficiently compact and the moisture content is at a certain level (T520), the temperature of the hay will rise to 160°F. At that point, the bacterial action will cease (the bacteria being killed by the heat) (T538), and chemical oxidation will take over



(T539). In that process, oxygen combines with carbon in the chemicals present to produce heat. That heat in turn produces more combining which produces still more heat (T539). Flames can then occur spontaneously at any point, depending on the availability of oxygen (T539).

In order to have the initial increase in heat production required to start the chain reaction of spontaneous combustion in hay, the hay must have a moisture content of at least 40 per cent (T517).

### C. CHRONOLOGY

In April, 1971, Harold Bigelow was introduced to Hay Savor during a visit to a Middlebury, Vermont farm, arranged by Stuart Newton, an employee of Agway, Inc. (T53, 104). Subsequently, he purchased Hay Savor and an applicator from the Enosburg, Vermont Agway store. After receiving the required assistance from Agway in installing the applicator (T414-415), Mr. Bigelow began to use Hay Savor on June 13, 1971 (T154).

On June 15, 1971, Mr. Newton and a representative of Kemin Industries, Mr. Nelson, went to Mr. Bigelow's farm on a promotional visit (T254, 260, 416). Together with Mr. Bigelow, they entered onto two hay fields of the farm (T260). One had been mowed on June 13 (T261); and the other, further from the house, had been mowed more recently (T261). Moisture tests taken by Mr. Nelson revealed that hay in the first field had a moisture content of 32 per cent. The more recently cut



hay in the further field registered 50 per cent plus (T261). There was no conversation about baling the 50 per cent hay (T262). Mr. Nelson and Mr. Bigelow did discuss whether the first field was ready for baling.

Mr. Bigelow said he was going to turn that hay over and bale it later on in the day (T262-264). Mr. Nelson said he thought that with Hay Savor, if the hay were turned over and aired, it would be ready to bale in the afternoon (T442; 262-263). That day the sky was clear, the temperature warm, and there was a nice breeze (T262, 287A, 288).

Mr. Newton testified it was "a beautiful sunny day a real good drying day" (T418). Mr. Nelson testified it "just looked like an ideal day for putting up hay." (T262-263).

On the evening of the same day, June 15, 1971, Mr. Newton and Mr. Nelson returned to the Bigelow farm. Hay baled that afternoon was on wagons but had not been put in the barn (T288). Mr. Nelson, using a bale probe moisture tester, tested between 10 and 15 bales (T265, 288). He found that the consistent moisture level among them was 22 per cent (T265, 289). Mr. Bigelow commented to Mr. Nelson that his hay was nice and dry (T265).

On June 19, 1971, Mr. Bigelow discovered that hay in a particular section of his barn was hot (T72-73). He called Mr. Newton (T73).

Mr. Newton and Erden Bailey, the County Agricultural Agent, went to the Bigelow farm and took temperature tests of the hay, finding it to be

in the range between 180° and 184° F. (T366, 422). Mr. Bailey gave Mr. Bigelow a brochure entitled "Will Your Barn Burn This Summer?" (Agway's Exhibit A); and told Mr. Bigelow his recommendation was to remove the hay at 185 degrees with precautions consistent with the warnings in the brochure (T366; see T118). Mr. Bailey also suggested two precautions to Mr. Bigelow: wet down the hay and have the fire department stand by during removal (T367).

Mr. Bigelow did not remove any hot hay on June 19. By June 21, the temperature was approaching 200 degrees (T274). On that day, Mr. Newton and Mr. Nelson returned to the farm (T273). Mr. Nelson suggested that Mr. Bigelow remove all stock and equipment from the barn in the event of a fire (T274). At the suggestion of Mr. Nelson (T275), the three men then drove to the St. Albans Fire Department (T275). A Fire Fighter named Rodney Paquette returned to the farm with them, as directed by the Deputy Chief (T357). Mr. Paquette checked the hot hay and recommended to Mr. Bigelow that he remove the hay immediately, as the situation was very hazardous (T357C-358) (see Agway's Exhibit B, Fire Department Report). No hay was removed on June 21.

From June 21 through July 7, the temperature of the hot hay fluctuated considerably, at one time going as high as 218 degrees (T144-145). During this period of time, Mr. Newton advised Mr. Bigelow to remove the hot hay from the barn (T428). Mr. Bigelow did not remove



the hay. Rather, during the period from June 19, when hot hay was first discovered, until the time of the fire, Mr. Bigelow continuously put additional hay in the barn (T173). On June 19, there were 3000 bales in the barn (T72). When the barn burned on July 8, there were 16,000 bales in the barn (T86).

On June 30, 1971, through the collaboration of Agway, the County Agricultural Agent and the Agricultural Engineering Department of the University of Vermont (T377), a probing device was made to inject carbon dioxide into the hot hay at the Bigelow farm. Carbon dioxide displaces oxygen necessary to support oxidation in the spontaneous combustion process (T458), thereby cooling the hay. The County Agent knew of this method from a book called Morrison's Feeds and Feeding (T458), a general reference book for agricultural people (T453).

Carbon dioxide was administered on June 30 in the morning (T379, 382). The temperature of the hot hay was reduced from 211°F down to 170°F (T383, 467), for lengthy periods of time (T386). Later that evening, it rose again to 190 degrees (T386). With five men helping, the hot hay (approximately 150 bales; T430) could have been removed from the barn in two and one-half to three hours (T430; 409-410).

Agway paid for the carbon dioxide (T385). On or before June 30, Agway offered to provide Mr. Bigelow with men to assist in removing the hay and to find replacement hay or compensate him in money for hay that

might be lost in removal (T248; 156; 388-389; 498-499). The St. Albans Fire Department also had agreed to furnish a water truck during removal (T313; 358; 429).

When the temperature dropped to 170 degrees on June 30, Andrew Tessman, an agricultural engineer associated with the University of Vermont (T450-451), recommended to Mr. Bigelow and the others present:

We've gotten down to this temperature, now is the time to get this stuff out of here. Let's get the Fire Department, wet it down, and cool it down more if we can and I would get it out.

(T467-468).

Mr. Bigelow responded, "Who is going to pay for the hay?" (T468).

Mr. Tessman testified "(W)hen I heard that after I recommended getting it out, I just felt like, gee, if that's as far as we can go, there's nothing more that I can do" (T468-469).

The hot hay was not removed on June 30. Agway continued to administer carbon dioxide through July 4. Thereafter, it left tanks of carbon dioxide with Mr. Bigelow to administer himself (T387). On July 6, Mr. Bigelow decided that the hot hay should be removed, but decided to put off the removal until July 8, at which time his haying would be finished (T389). On July 7, when the temperature of the hot hay was 210 degrees (T145), 1600 bales were put in the barn (T173-174). The barn burned in the early morning hours of July 8, 1971.



#### IV. ARGUMENT

##### A. THERE WAS NO EVIDENCE OF PROXIMATE CAUSE, AND IT WAS PROPER FOR THE COURT TO DIRECT THE VERDICT.

In directing a verdict in favor of the Defendants on the theories of negligence, warranty and strict tort liability, the Trial Court found the controlling factor to be that Plaintiffs failed to show Defendants' conduct was the proximate cause of the fire. Whether proximate cause was shown is the only pertinent question raised on appeal. If the answer were in the affirmative, the issues of negligence, warranty and strict tort liability concededly might then be issues proper for jury determination.

Appellants concede that proof of proximate cause is essential to recovery under Vermont Law on claims of negligence. Cameron v. Bissonnette, 103 Vt. 93, 152 A. 87 (1930); Humphrey v. Twin State Gas & Elec. Co., 100 Vt. 414, 139 A. 440 (1928). So also, breach of warranty. 9A V.S.A. § 2-715. The only issue in the case at bar is the sufficiency of the evidence to support the claim. The Vermont Law in this respect is clear.

The burden is on the Plaintiff to prove that Defendant's conduct was the proximate cause of Plaintiff's injury. Lewis v. Vermont Gas Corp., 121 Vt. 168, 179, 151 A.2d 297, 304 (1969). "Liability for negligence (or breach of warranty) is not established until the fact of injury is traced and connected to an act or agency that is the Defendant's responsibility."



McDonnell v. Montgomery Ward & Co., 121 Vt. 221, 229, 154 A.2d 469, 475 (1959). Although proximate cause may be shown by direct or circumstantial evidence, the evidence must be sufficient at least to support a logical inference of a causal relationship between the Defendant's conduct and the Plaintiff's injury. Scribner v. Richmond Farm Supply Co., 125 Vt. 492, 219 A.2d 1 (1966); Wellman v. Wales, 97 Vt. 245, 122 A. 659 (1923). Evidence which makes it merely possible or conjectural that causation exists, is an insufficient foundation for a verdict against a Defendant. See Milne v. Edson, 116 Vt. 226, 73 A.2d 325 (1950).

The only conduct complained of in this case, under either the negligence or warranty theory, is the representation made by Mr. Nelson to Mr. Bigelow on June 15, 1971, that, if turned, the hay would be ready to bale later in the day with the use of Hay Savor. The Court will view the evidence surrounding this representation "in its strongest light in favor of the (Appellants), and (giving them) the advantage of every fair and reasonable intendment that the evidence can justify," 5A J. Moore, Federal Practice ¶ 50.02 (1), at 2326-27 (1974), citing, inter alia, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Brown v. United States Fid. & Guar. Co., 314 F.2d 675 (2d Cir. 1963). Yet the inescapable conclusion must be, as Judge Holden stated: There was no "...proof of causal connection between the Plaintiffs' damage and the use of the Defendants' product..."; There was "...no evidence that

the hay that was baled on June 15th developed hot spots or that was the source of the fire which occurred on July 8th." Appellants' Appendix, at 2a.

The circumstances surrounding the June 15th representation were as follows: (1) the moisture content of the hay in question was 32 per cent (T261); (2) Mr. Bigelow thought the hay might be too green (T63); but (3) he told Mr. Nelson he was going to turn the hay over and bale it later that day (T262-264); and (4) the clear sky, warm temperature and nice breeze made it a "real good drying day" (T418).

The facts show that while Mr. Nelson was attempting to promote his product that day (see T260), Mr. Bigelow was an expert farmer of long experience (T52). The product brochure given him (T517-518) and the label on the product cannisters he used (T376) contained the clear statements that the moisture level of baled hay should be 25 per cent or less. Mr. Nelson's statement, made conditional on the hay being turned on a clear, warm day, did not contradict, modify or supersede the explicit 25 per cent warning direction.

The rational interpretation of Mr. Nelson's statement clearly is that the ideal weather conditions would dry the hay as it was turned, causing over the course of the day the moisture content of the hay to drop below the 25 per cent level acceptable when Hay Savor is used. The uncontradicted evidence was that the hay Mr. Bigelow baled, allegedly in



reliance on Mr. Nelson's statement, had a moisture content of 22 per cent when it was ready for storage in the barn. (T265-289).

Twenty-two per cent moisture content is well within the 25 per cent guideline for Hay Savor use. It is far below the 40 per cent moisture threshold physically necessary for spontaneous combustion to occur. (T517; 523-524). Moreover, the uncontradicted expert testimony given at trial was that hay treated with Hay Savor and stored with a moisture content of 22 per cent was "very acceptable" (T516), and would not have a moisture content sufficient to produce spontaneous combustion. (T516).

Mr. Bigelow's barn fire could not have been caused, as Appellants claim, "by his storage of moist hay in reliance on the negligent assurances of the Defendants' representative, Mr. Nelson." Appellants' Brief, at 13. Even assuming that Mr. Nelson's statement was negligently made, and that Mr. Bigelow relied on it, the hay baled and stored by Mr. Bigelow as a result of the statement did not contain sufficient moisture to cause the spontaneous combustion which burned the barn. Therefore, Judge Holden was correct in directing a verdict for the Defendant Kemin Industries.

There is evidence, contracticted in part by Mr. Bigelow, indicative of the factors producing the hot hay. Mr. Nelson testified that he and Mr. Bigelow, on the morning of June 15 (T282), went into the barn (T283). There was baled hay stacked in the center section of the barn (T284). Mr. Bigelow told Mr. Nelson that some of the hay was treated with Hay Savor, and some was untreated (T285). Mr. Nelson made moisture tests

of the hay and the tests ran between 20 and 40 per cent (T266; 284-285). Moisture of 40 per cent was far in excess of the Hay Savor warning directions, and might cause spontaneous combustion (T517). Mr. Bigelow denied that Mr. Nelson went into the barn on the first day he was there (T112). The testimony throughout the trial of Mr. Bigelow was that it was June 16th when Mr. Nelson and Mr. Newton first came to his farm. All other witnesses testified that the date was June 15.

Moreover, there was testimony that the only hot spot in the hay (T380; 407) was located directly under a hole in the barn roof, of the same proportion in length and width as the hole (T380-381). The function of the hole was to raise bales of hay up to the roof on an elevator and drop them through to the hay mow for stacking (T70). The hole in the barn roof suggests two explanations for the production of the hot hay. First, some of the falling bales would break open, resulting in the presence of loose hay chaff, believed to contribute to the heating (T274-276). Second, early during the time material, the hole was uncovered during a heavy rain (T278). The expert testimony of the effect of rain on stacked hay was increase of the moisture content of the hay, raising the temperature (T524). The year material, while perhaps the first year Mr. Bigelow experienced hot hay (T72), was also the year the hole was cut in the roof. (T70).

B. IF PROXIMATE CAUSE WAS SHOWN, BIGELOW'S ASSUMPTION  
OF THE RISK BARS RECOVERY, AND THIS COURT SHOULD AFFIRM  
THE JUDGMENT BELOW.



In directing the verdict, Judge Holden stated for the record that, "(i)ndeed, there is substantial evidence that the Plaintiff did assume the risk within the doctrine of our cases, however, the Court doesn't feel it necessary to predicate its ruling on that aspect of the case." Appellants' Appendix, at 3a.

Should this Court find on appeal a sufficient show of proximate cause at trial, it must consider further the "substantial evidence" relative to assumption of the risk and affirm the directed verdict on the basis of that doctrine.

"An appellant court reviews judgments, not the reasons which may be given in their support. It is only common sense that if, on the record before us, we determine that the judgment is correct, it should be affirmed, regardless of the correctness of the reasons which may be given to support it. ... If we conclude that the trial judge should have granted defendants' motion for a directed verdict, we should affirm the judgment as rendered, whatever errors appellants may convince us were made by the judge during trial.

... "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." ...

Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 89 (9th Cir. 1961), rev'd on the grounds, 370 U.S. 690 (1962), quoting Jaffke v. Dunham, 352 U.S. 280, 281 (1957).

Assumption of risk may arise in diverse situations.

"...the plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily



to encounter it -- as where he has been supplied with a chattel which he knows to be unsafe, and proceeds to use it after he has discovered the danger. If this is a voluntary choice, it may be found that he has accepted the situation, and consented to relieve the defendant of his duty."

W. Prosser, Torts § 68, at 440 (4th ed. 1971). See Bouchard v. Sicard, 113 Vt. 429, 431, 35 A.2d 439 (1944).

The application of the doctrine of assumption of risk in particular fact situations does frequently present "problems." Hoar v. Sherburne Corp., 327 F. Supp. 570, 572 (D. Vt. 1971) (Oakes, J.). However, it is clear from the Vermont decisions that the contemporaneous existence of three factors will bar a plaintiff from recovery: (1) knowledge of the existence of the risk; (2) appreciation of the extent of the danger; and (3) surrounding circumstances warranting the inference that plaintiff encountered the risk freely, voluntarily and with full knowledge of the nature and extent thereof. Beck v. Dutra, 129 Vt. 615, 617-18, 285 A.2d 732 (1971); Cameron v. Abatiell, 127 Vt. 111, 119-20, 241 A.2d 310 (1968); Killary v. Burlington-Lake Champlain Chamber of Commerce, 123 Vt. 256, 262-63, 186 A.2d 170 (1962).

The first essential requisite of the defense of assumption of risk--knowledge of the existence of the risk--is satisfied. The evidence was that Harold Bigelow called Agway to inform its agents of the hot hay problem (T73). Throughout the month of June, 1971 he solicited their assistance.

The second necessary element--appreciation of the extent of the danger--is satisfied. The evidence was that Bigelow gave notice of the

hot hay problem to Agway. Further, Bigelow saw the extension service brochure. (Agway's Exhibit A). Moreover, he was advised by the county agent (T366), by the St. Albans Fire Department (T357C-358), by Agway personnel (T428) and by Mr. Tessmann of the University of Vermont that he should remove his hay, and especially at such time as the temperature of the hay dropped to a low degree (T467-468). The extent of the danger posed by the risk was at the very least at all times loss of the barn and hay by fire. (See T64).

The final remaining issue is whether the circumstances warrant the inference that Plaintiffs assumed the risk freely and voluntarily. It is important to note the risk encountered by Plaintiffs was not that of the initial use of the product Hay Savor by Mr. Bigelow. Rather, it was a risk as described in the quote from Prosser, supra, to wit, the risk of his own action after notice of the high temperature of the hay. Having knowledge and notice of the hot hay and the danger inherent therein, Mr. Bigelow proceeded freely and voluntarily to assume the risk presented by the hot hay.

The law is clear that Mr. Bigelow's assumption of the risk would be involuntary only if he had no reasonable alternative course of conduct in order either to: (a) avert harm to himself or another; or (b) exercise or protect a right of privilege of which the defendant has no right to deprive him. Restatement (Second) of Torts §496E, quoted and followed in Beck v. Dutra, 129 Vt. 615, 618, 285 A.2d 732 (1971).



In brief, the uncontradicted evidence in the case at bar disclosed that at such time as the temperature of the problem hay was reduced to a level at which it could have been removed "using some plain common sense," it should have been removed. At that time, Mr. Bigelow was advised by experts to remove the hay (T467-468). Further, at that time he was offered by Agway assistance in removal and reimbursement for any hay lost (T248; 156; 388-389; 498-499). Mr. Bigelow freely and voluntarily made the decision not to remove the problem hay from his barn (see T498). Rather, he chose to encounter and assume the risk presented by the problem hay. In fact, he decided to put off removal until his haying was done (T389) and all the hay was in the barn. This choice was voluntary. Mr. Bigelow unquestionably had a reasonable and safe alternative course of action to that which he selected. Such alternative course of action, if chosen, would have averted all harm to Plaintiffs.

#### V. CONCLUSION

The judgment of the District Court should be affirmed on the grounds that first, there was no showing of proximate cause; and second, the doctrine of assumption of the risk bars recovery.

Dated at The City of Rutland, County of Rutland and State of Vermont  
this 24th day of June, 1974.

KEMIN INDUSTRIES, INC.  
Defendant-Appellee

By Ryan, Smith and Carbine, Ltd.  
Mead Building  
Rutland, Vermont 05701

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 1974  
I served the Brief for Defendant-Appellee, Kemin Industries,  
Inc., by mailing two copies of the same, to Peter F.  
Langrock, Esquire, Drawer 351, Middlebury, Vermont 05753  
and to Lawrence Miller, Esquire, Miller & Hill, 128 Merchants  
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James P. Haugh